

# Enforcement of Anti-Trust Laws in the EEC

## Introduction

Recent headlines in the *New York Times*<sup>1</sup> and the *Wall Street Journal*<sup>2</sup> describing anti-trust activity by Common Market authorities against an American company, Continental Can of New York, might lead one to believe that the European Economic Community is pursuing a vigorous extra-territorial application of its anti-trust rules. The purpose of this paper is to show that in reality the case is not so clear-cut that a vigorous enforcement policy has generally been adopted. Further, it is planned to show that true extraterritorial application<sup>3</sup> of Articles 85 and 86 is rare, and that, at least in the application of Article 85, there has been no discernible pattern of discrimination against American firms.

In discussing Articles 85 and 86 of the Rome Treaty, mention will be made of some general definitional concepts as developed by EEC Commission and Court of Justice practice as well as by legal commentators, and the writer will then concentrate on the extraterritorial application of these sections. Public international law limitations on the extra-territorial reach of antitrust laws,<sup>4</sup> or the practical problems of EEC enforcement of its anti-trust measures outside the Common Market will not be considered.

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<sup>1</sup>"EEC Trust Rule Hits U.S. Concern," *New York Times*, December 14, 1971, p. 67; David Blake, "Common Market vs. Continental Can," Section 3, *New York Times*, December 19, 1971, pp. 1, 11; "U.S. Can Maker Faces Court Action," *New York Times*, June 29, 1972, p. 57.

<sup>2</sup>"Continental Can Loses Unusual Antitrust Case in the Common Market," *Wall Street Journal*, December 14, 1971, p. 11; "Continental Can Co. Expected To Propose Settlement Plan to EC," *Wall Street Journal*, March 23, 1972, p. 4; "Continental Can Says Case Against a Unit In Europe Moves Along," *Wall Street Journal*, April 26, 1972, p. 10.

<sup>3</sup>Within the EEC anti-trust context it is submitted that "true extraterritorial application" applies only to the utilisation of Articles 85 and 86 to attack activities outside the Common Market of either EEC or non-EEC firms. However, the application of EEC anti-trust rules to the business activities of non-EEC companies within the Common Market will also be discussed.

<sup>4</sup>For the European view, see M. Robert Kruithof, *The Application of the Common Market Anti-Trust Provisions to International Restraints of Trade*, 2 COMMON MARKET L.

## Chapter I. Article 85: Ban on Restrictive Agreements and Practices

### A. *The Concept of Enterprise*

Since Article 85(1) prohibits "all agreements between enterprises, all decisions by associations of enterprises,"<sup>5</sup> a definition of the term "enterprise" is of essential importance. According to Graupner, "(t)his is not a legal term found in the general law of any of the Member States nor is it defined in the Treaty. It is now however recognized as referring to any economic unit—either a single individual or several individuals combined in a partnership or corporation. . . ."<sup>6</sup>

Deringer emphasizes the legal aspect of the concept: "A legal entity, irrespective of its legal form or its position with regard to property rights, is therefore essential for an enterprise within the meaning of cartel law generally and of Article 85(1) in particular.<sup>7</sup> . . . the term 'enterprise' requires legal independence. It is doubtful whether it also requires economic independence. . . ."<sup>8</sup>

McLachlan and Swann,<sup>9</sup> and a note in the 1965 Stanford Law Review,<sup>10</sup> also stress that "enterprise" is mainly an economic concept whose existence or lack of existence must be established by the EEC Commission on a factual, case-by-case basis. The author's own view is that "enterprise" in the EEC context has both some legal and some economic meaning. Thus it must be a legal entity capable of entering into binding agreements, and assuming rights and obligations. Further, it must constitute an identifiable economic entity with some effective factual independence.

Since there is no geographical delimitation of "enterprise" in the Rome Treaty, the concept covers companies incorporated and having their main seats outside the Common Market:

Neither Articles 85 to 90 nor Regulation No. 17 have an express provision,

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REV. 69 (1964-5). For the broader American position, see, RESTATEMENT SECOND, FOREIGN RELATIONS LAW OF THE U.S., American Law Institute Publishers, St. Paul, 1965, Sections 18, 40, and the Comments to these Sections.

<sup>5</sup>All references to the Rome Treaty are to the English version in ERIC STEIN & PETER HAY, DOCUMENTS FOR LAW AND INSTITUTIONS IN THE ATLANTIC AREA, Bobbs-Merrill Co., Indianapolis, 1967. The EEC Treaty in English may also be found, *inter alia*, in 298 U.N.T.S. 3(1958), and in CCH COMMON MARKET REPORTER.

<sup>6</sup>RUDOLF GRAUPNER, THE RULES OF COMPETITION IN THE EUROPEAN ECONOMIC COMMUNITY, Martinus Nijhoff, The Hague, 1965, p. 11.

<sup>7</sup>ARVED DERINGER, THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY, Commerce Clearing House, Chicago, 1968, pp. 5-6.

<sup>8</sup>*Id.*, at 8.

<sup>9</sup>D. L. MCLACHLAN & D. SWANN, COMPETITION POLICY IN THE EUROPEAN COMMUNITY, Oxford U. Press, London, 1967, p. 130.

<sup>10</sup>Note, The Substantive Rules of Anti-trust in the Common Market: Analysis and Approach, 17 STANFORD L. REV. 257 (1965), p. 263.

whether they apply to enterprises outside the Common Market or not. Therefore the answer only depends on whether the cartel a) restricts competition within the Common Market, and b) is likely to affect trade between Member States. It is, however, of no importance if the enterprises concerned are residing within the Common Market or outside it. Therefore even an agreement between two or more Common Market enterprises may not fall under Article 85(1). . . On the other hand, an agreement between one enterprise within the Common Market and another outside it, *e.g.*, a license agreement, or even between two or more enterprises outside the Common Market may violate Article 85(1), if the two conditions mentioned above are met.<sup>11</sup>

Von der Groeben, a member of the EEC Commission, has stated that the Commission will "apply the rules of competition to all restraint of competition in the Common Market, whether it is practiced by firms inside or outside the Community."<sup>12</sup>

One practical problem in defining what constitutes a single enterprise is of particular interest to the international, but American based and controlled, conglomerates with subsidiaries in various countries: Are the parent and subsidiary companies, or two subsidiaries of the same parent, to be regarded as separate enterprises which, therefore, are subject to Article 85 concerning their restrictive trade agreements with each other?

### *B. The Parent-subsidiary Relationship*

A Commission decision of June 18, 1969, granted negative clearance and thus approved an admittedly trade-restrictive agreement between *Christiani & Nielsen A/S, Denmark*, and its wholly owned subsidiary, *Christiani & Nielsen, Holland*.<sup>13</sup>

This important decision deserves quotation at some length:

In order for Article 85, paragraph 1, of the Treaty to be applicable, however, there must be competition between the enterprises concerned that could be restricted. This condition is not necessarily fulfilled in dealings between two enterprises operating in the same economic field, merely because each of these enterprises has a separate legal personality. In this connection, it must be determined on the basis of the facts, whether it is possible for the subsidiary to take an economic measure independently of the parent company. . . For reasons of management, this enterprise, whose activities are international, formed subsidiaries in various countries rather than establish branches or agencies. What is involved here is an element of market strategy that does not result in the conclusion that, in this case, a wholly-owned subsidiary is an economic entity that can compete with its parent . . . *Christiani & Nielsen, The Hague*, is, therefore, an integral part of the economic whole of the *Christiani & Nielsen group*. . . The division of markets

<sup>11</sup>Arved Deringer, *The Common Market Competition Rules, with Particular Reference to Non-Member Countries*, 12 INT'L & COMP. L.Q. 582 (1963), pp. 584-585.

<sup>12</sup>Hans von der Groeben, *Competition Policy As Part of Economic Policy in the Common Market*, 10 ANTITRUST BULL. 911 (1965), p. 926.

<sup>13</sup>CCH COMMON MARKET REP. Section 9308.

provided for in the agreement is, therefore, only a division of labor within the same economic entity. Under these circumstances, it cannot be expected that one part of this entity—even though it has a separate legal personality—will compete with the parent company.<sup>14</sup>

In its recent decision concerning distribution arrangements by the EEC, national subsidiaries of the American Eastman Kodak Company, the Commission found that the subsidiaries were so controlled by the American parent that the whole group constituted a single enterprise.<sup>15</sup> Although the Court of Justice in *Deutsche Grammophon Gesellschaft mbH*,<sup>16</sup> failed to deal with this issue, Advocate General Roemer, relying on the Commission's position in *Christiani & Nielsen* and *Kodak*, argued that Article 85(1) was inapplicable to a mere division of functions within a single economic entity, when there was no competition as the subsidiary was subject to the parent's full control and instructions.<sup>17</sup>

An interesting twist was provided by the July 24, 1969 Commission decision against ten *Dyestuff Manufacturers*,<sup>18</sup> in which it was emphasized that the parent producers were fined for ordering their fully controlled EEC subsidiaries to engage in illegal, trade restrictive practices: "Proof of the existence of concerted practices was found on the part of the various producers, irrespective of whether their head office was within or outside of the Common Market, and not on the part of their subsidiaries or representatives. The instructions to these subsidiaries or representatives to raise their prices were binding."<sup>19</sup>

Markert notes the paradox in the *Dyestuff* case that, although the Commission expressly stated that the four non-EEC producers were fined for acts attributable to them and not for the acts of their EEC subsidiaries, "the Commission said that since the EEC subsidiaries of Ciba, Geigy, Sandoz, and I.C.I. were entirely controlled by their parents and therefore within their domain, it was sufficient to effect service (of the decision imposing the fines) at the location of their subsidiaries."<sup>20</sup>

The commentators agree with the Commission that a parent and its wholly owned subsidiaries be considered as a single enterprise. According to McLachlan and Swann, "(i)t would be unreasonable to expect a wholly-owned subsidiary to compete with the parent company and in this

<sup>14</sup>*Id.*, at 8659.

<sup>15</sup>CCH COMMON MARKET REP., Section 9378 (June 30, 1970).

<sup>16</sup>CCH COMMON MARKET REP., Section 8106 (June 8, 1971).

<sup>17</sup>*Id.*, at 7199.

<sup>18</sup>CCH COMMON MARKET REP., Section 9314.

<sup>19</sup>*Id.*, at 8691.

<sup>20</sup>Kurt E. Markert, *The Dyestuff Case: A Contribution to the Relationship between the Antitrust Laws of the European Economic Community and its Member States*, 14 ANTITRUST BULL. 869 (1969), p. 897.

case common sense would treat the two as one enterprise."<sup>21</sup> Lang reasoned "(i)f neither competition nor formal legal arrangements (that would permit the companies to compete at arm's length) exist between the associated companies, it is submitted that they constitute a single enterprise and are free to enter into anti-competitive arrangements with each other."<sup>22</sup> Graupner,<sup>23</sup> Schwartz,<sup>24</sup> and Deringer<sup>25</sup> are all in accord, stressing that a subsidiary must have a measure of economic independence before it will be treated as a separate enterprise.

Thus the Commission and the legal writers hold that in examining each parent-subsidiary relationship individually, the Commission must make a factual determination based on the economic realities. This is true even if parental control is maintained through less than one hundred percent ownership, since the key is the possibility of competition between the companies and not the percentage of parental ownership. However, the Commission may, in the future, adopt a *de-minimis* rule, stating that if ownership by the parent is below X percent the Commission will presume that the enterprises are separate.

The same type of factual economic analysis is necessary to establish whether, in their dealings with each other, two subsidiaries of the same parent constitute a single enterprise. In its *Kodak*<sup>26</sup> decision the Commission decided that the EEC subsidiaries of Kodak made up a single economic, controlled unit, and hence agreements between the subsidiaries could not restrict competition within the Common Market. It is possible that in a future case the Commission will find, that a parent exercised its control over the subsidiaries in such a manner as to permit them to compete with each other. Under such conditions, agreements between two controlled subsidiaries may be held to violate Article 85.

An interesting issue, still to be resolved, involves an EEC subsidiary found to be controlled by its non-EEC parent: for purposes of the Commission regulations on the notification of agreements and furnishing information, does the "single" enterprise "belong to a Member State"?<sup>27</sup> In

<sup>21</sup>McLACHLAN AND SWANN, *supra*, note 9 at 130.

<sup>22</sup>JOHN TEMPLE LANG, *THE COMMON MARKET AND COMMON LAW*, U. of Chicago Press, Chicago, 1966, p. 385.

<sup>23</sup>GRAUPNER, *supra*, note 6 at 11.

<sup>24</sup>Herman Schwarz, *The Common Market Antitrust Laws and American Business* 1965 U. ILL. L. F. 617, p. 627.

<sup>25</sup>Deringer has steadfastly held this view since 1963: Deringer article in 12 INT'L & COMP. L.Q. (1963), pp. 587-588; Deringer, *Problems of Distribution within the Common Market* 10 ANTITRUST BULL. 105 (1965), p. 113. and *supra* note 7 at 8-9.

<sup>26</sup>CCH COMMON MARKET REP., Section 9378 (June 30, 1970).

<sup>27</sup>George Nebolsine, *Foreign Enterprises under the Common Market Antitrust Rules*, 38 N.Y.U. LAW REV. 479 (1963), p. 481.

the normal situation without this parent-subsidary issue, it is clear that even one hundred percent non-EEC ownership of a Common Market firm does not affect the Commission's full jurisdiction over the firm,<sup>28</sup> and it seems likely that the Commission will assert its jurisdiction over the whole parent-subsidary complex as well.

In its decision against the American-based *Continental Can Co.*,<sup>29</sup> the EEC Commission recognized two enterprises in the subsidiaries of Continental Can, yet held the parent company liable for their conduct:

Continental Can Company, Inc. (Continental), Europemballage Corporation (Europemballage), and Schmalbach-Lubeca-Werke AG (SLW), companies doing business directly or indirectly in the Common Market, are enterprises within the meaning of Article 86 of the EEC Treaty.

Since it is the sole shareholder of Europemballage and holds 85.8 percent of SLW's capital, Continental controls both of these enterprises. It must therefore be held accountable for their conduct.<sup>30</sup>

While *Continental Can Co.* involved the application of Article 86 and was thus concerned with the abuse of a dominant market position, there seems little doubt that the Commission will rely on the same theory in the field of Article 85 to hold parent companies liable for the conduct of their subsidiaries even though these subsidiaries were recognized as separate "enterprises."

### C. Apt to Affect Trade Between the Member States

Unlike the Sherman Act, Article 85(1) is concerned only with restrictive agreements and practices "which are apt to affect trade between the Member States." This pre-requisite is the chief obstacle to the true extra-territorial application of the EEC anti-trust laws, to activities outside the Common Market by either EEC or non-EEC firms. However, if trade between Member States is found to be affected, Article 85(1) applies without any distinctions being drawn on the ground that the enterprises involved are EEC or non-EEC companies.

The big debate concerning this clause involved the question whether it required that trade be adversely affected. By now it has been established that despite ambiguity in the various official language texts of the Treaty, trade need not be adversely affected under 85(1). Thus for Schwarz, "any interference with the 'normal' market forces of supply and demand is within the scope of Article 85(1)."<sup>31</sup> Deringer fully agrees:

<sup>28</sup>*Id.*

<sup>29</sup>CCH COMMON MARKET REP., Section 9481 (December 13, 1971).

<sup>30</sup>*Id.*, at 9029.

<sup>31</sup>Schwarz in 1965 U. ILL. L. F., p. 629.

The flow of trade would be hampered, or at least be placed in jeopardy (and because of the word 'apt' this is sufficient), where a restraint of competition within the meaning of Article 85(1) changes the intensity or the direction of the flow of goods, thereby artificially diverting it from its normal, natural course.

Accordingly, the requirement of an aptness to affect inter-Member-State trade does not allow for a restraint of competition within the Common Market to be judged according to whether its effects on economic intercourse are in any way 'harmful' or 'beneficial'.<sup>32</sup>

Graupner<sup>33</sup> and Honig et al.<sup>34</sup> also share this view. In its *Faience Convention*<sup>35</sup> decision, the Commission held that the agreement involved violated Article 85(1), although it was shown that trade between Member States in those products actually increased subsequent to the objectionable restrictive agreement. The lack of the adverse effect requirement became firmly established by the Court of Justice in *Consten and Grundig v. EEC Commission*.<sup>36</sup>

The plaintiffs claimed . . . that the Commission had not shown that, in the absence of the agreement, interstate trade would have been greater. . . In the Court's view the crux of the matter was whether the agreement was liable to threaten, directly or indirectly, actually or potentially, the freedom of trade in a way which impeded the attainment of a single market. It felt that the re-export prohibition patently did constitute such an impediment. . .<sup>37</sup>

Thus, the fact that an agreement favours an increase—even a considerable one—in the volume of trade between States is not sufficient to exclude the fact that this agreement might 'affect' such trade . . .<sup>38</sup>

In *S. A. Cadillon v. Firma Hoss, Maschinenbau KG*,<sup>39</sup> the Court of Justice of the EEC held that an agreement is apt to affect trade between Member States if its legal or factual status leads to an inference "with a sufficient degree of probability" that the agreement "could, directly or indirectly, actually or potentially" affect trade between Member States.

The implications of the necessity that "trade between the Member States" be affected for Article 85(1) to apply, will be considered at some length in Section D, pat.

<sup>32</sup>DERINGER, *supra*, note 7 at 23.

<sup>33</sup>GRAUPNER, *supra*, note 6 at 14.

<sup>34</sup>FREDERICK HONIG, WILLIAM J. BROWN, ALFRED GLEISS and MARTIN HIRSCH, *CARTEL LAW OF THE EUROPEAN ECONOMIC COMMUNITY*, Butterworths, London, 1963: pp. 12-13.

<sup>35</sup>CCH COMMON MARKET REP., Section 7023 (May 1964).

<sup>36</sup>CCH COMMON MARKET REP., Section 8046 (July 13, 1966).

<sup>37</sup>MCLACHLAN and SWANN, *supra*, note 9 at 175.

<sup>38</sup>M.R. Mok, *The Cartel Policy of the EEC Commission, 1962-1967*, 6 COMMON MARKET L. REV. 67 (1968-9), p. 91.

<sup>39</sup>CCH COMMON MARKET REP., Section 8135 (May 6, 1971).

*D. Object or Effect of the Prevention, Restriction or Distortion of Competition within the Common Market*

The EEC Commission has developed a *de-minimis* rule under which restrictive arrangements with only minor effects within the Common Market are deemed to be outside the coverage of Article 85(1). The Commission's Notice on Agreements, Decisions, and Concerted Practices of Minor Importance Not Coming within Article 85(1) of the Treaty,<sup>40</sup> issued on June 2, 1970, codifies this rule:

The Commission believes that agreements between enterprises engaged in the manufacture or distribution of goods do not come within the prohibition of Article 85, paragraph 1, of the EEC Treaty where:

- the products involved, in the part of the Common Market covered by the Agreement, account for no more than five percent of the turnover in the same products or products considered to be similar by consumers on the basis of their properties, utility or price, and
- the total annual turnover of the enterprises that are parties to the agreement does not exceed 15 million units of account (= \$) or, for agreements between trading enterprises, 20 million units of account.<sup>41</sup>

The turnover total is calculated for this purpose by combining parent-subsidiary groups into one unit. The Notice emphasizes that the Rome Treaty applies only to arrangements that have an appreciable effect on market conditions, and adds that even some agreements falling outside the standards listed may be held to impair trade between Member States only slightly and hence not be barred by Article 85(1).

The position of the Commission is in full accord with the prior decisions of the Court of Justice on this subject. In *Société Technique Minière v. Maschinenbau Ulm*,<sup>42</sup> the Court laid down the rule that the relevant market circumstances determine whether an exclusive selling agreement is prohibited by Article 85(1). In *Volk v. Ets. J. Vervaecke S.P.R.L.*,<sup>43</sup> the Court held that due to the weak market position of the parties concerned, an exclusive distributorship contract with an absolute territorial protection clause did not violate Article 85(1),<sup>44</sup> and reiterated this view in *S. A. Cadillon v. Firma Hoss, Maschinenbau KG*.<sup>45</sup> *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen*<sup>46</sup> stands for the proposition that a requirements contract does not per se violate Article 85(1), but that the market context,

<sup>40</sup>CCH COMMON MARKET REP., Section 2700.

<sup>41</sup>*Id.*, at 1853-1854.

<sup>42</sup>CCH COMMON MARKET REP., Section 8047 (1966).

<sup>43</sup>CCH COMMON MARKET REP., Section 8074 (July 9, 1969).

<sup>44</sup>The agreement covered washing machines that made up 0.08% of the EEC production and 0.2% of the total German production, and 0.6% of the sales in the assigned territory that comprised Belgium and Luxemburg.

<sup>45</sup>CCH COMMON MARKET REP., Section 8135 (May 6, 1971).

<sup>46</sup>CCH COMMON MARKET REP., Section 8053 (December 12, 1967).



including information concerning the contracts of other sellers in the same market is determinative.

This rejection of a *per-se* rule for violations of 85(1), coupled with the insistence on "appreciable effects" and on a factual, case-by-case determination based on conditions in the affected relevant market for the product subject to the restrictive arrangement, in effect constitutes the adoption of a limited, American-style rule of reason. Thus Joliet, who in 1967 already showed the desirability of a rule of reason in the enforcement of Article 85(1), aside from the built-in rule of reason found in 85(3), seems to have been proved right.<sup>47</sup>

Aside from possible differences due to the variance in the delineation of territorial applicability, whatever arrangement "appreciable effects" competition within the Common Market will also necessarily "be apt to affect trade between Member States," since the latter was defined as an interference with the normal market forces of supply and demand. "It is clear that the perceptibility of a restriction of competition, by its nature, must have an effect on the results attained."<sup>48</sup>

In fact the Commission in its practice applies the same standard of "some important effect" to both the "apt-to-affect-trade" and the "object-or-effect-the-prevention,-restriction-or-distortion-of-competition" tests in Article 85(1).<sup>49</sup> Language in the recent Court of Justice case, *Sirena S.r.l. v. Eda GmbH*,<sup>50</sup> adds weight to the practical interchangeability of these two ideas: "A cartel agreement comes within Article 85, paragraph 1, only where it appreciably impairs trade between Member States and restricts competition within the Common Market."<sup>51</sup>

#### *E. The Territorial Limitation on the Applicability of Art. 85*

Since "within the Common Market" has a broader geographical applicability than the concept "between the Member States," the within discussion will focus on the latter, narrower term. An agreement that affects one Member State only is not covered by Article 85, although it may in fact have sizeable effects within the Common Market, *i.e.* within that one State.

<sup>47</sup>RENÉ JOLIET, *THE RULE OF REASON IN ANTITRUST LAW*, Martinus Nijhoff, La Haye, 1967, pp. 115-116, 184-185. See also, Warren F. Schwartz and Edward W. Wellman, Jr., *The Rule of Reason in EEC Antitrust: Efficiency Enhancement Through Integration by Agreement among Competitors*, 12 VIRGINIA J. INT'L L. 192 (1972).

<sup>48</sup>Mok, *supra*, note 38 at 86.

<sup>49</sup>Deringer in 10 ANTITRUST BULL., pp. 109-110.

<sup>50</sup>CCH COMMON MARKET REP., Section 8101 (February 19, 1971).

<sup>51</sup>*Id.*, at 7112.

Campbell<sup>52</sup> and the CCH Common Market Reporter<sup>53</sup> list a series of decisions by national courts holding that Article 85 does not apply to the domestic, one-state arrangements that were attacked as violating Article 85. However, a purely intra-state practice may have an appreciable, though indirect, effect on trade between Member States, *e.g.*, an exclusive dealing arrangement between all manufacturers and retailers of a product in one state.<sup>54</sup> In 1969 the EEC Commission decided that the standard sales conditions imposed by Agfa-Gevaert in Germany only, which banned ports in order to effectuate a resale price maintenance system valid under German law, violated Article 85.<sup>55</sup>

In the *S.A. Brasserie de Haecht* case,<sup>56</sup> the European Court of Justice held that an exclusive purchase contract between a Belgian brewery and a Belgian tavern owner may violate 85(1), as the few Belgian brewers had such contracts with a high percentage of the Belgian customers. A more recent decision of the Court in *Braüerei A. Bilger Sohne GmbH v. Heinrich and Marta Jehle*<sup>57</sup> also involved an exclusive purchase contract for beer, this time in Germany. The Court decided that although Regulation No. 17 did not require notification of an agreement between enterprises of only one state involving neither exports nor imports between Member States, the Commission may find that the agreement is contrary to Article 85(1).

But the exercise of certain rights under national law without any accompanying restrictive agreements has been held by the Court of Justice not to violate 85(1), even though the net result is a reduction of intra-EEC competition: *Parke, Davis and Co. v. Probel*,<sup>58</sup> on the exercise of national patent rights; and *Sirena S.r.l. v. Eda GmbH*,<sup>59</sup> on the exercise of national trademark rights.<sup>60</sup>

As a general rule, agreements regulating exports by EEC companies to

<sup>52</sup>ALAN CAMPBELL, 1 COMMON MARKET LAW, Longmans, Green & Co., London, 1969, p. 161.

<sup>53</sup>CCH COMMON MARKET REP., Section 2011.70-.75.

<sup>54</sup>McLACHLAN and SWANN, *supra*, note 9 at 132.

<sup>55</sup>CCH COMMON MARKET REP., Section 2021.754 (December 30, 1969, Commission Press Release). For other examples, see Sections 2021.77 and 9201.

<sup>56</sup>CCH COMMON MARKET REP., Section 8053 (December 12, 1967).

<sup>57</sup>CCH COMMON MARKET REP., Section 8076 (March 18, 1970).

<sup>58</sup>CCH COMMON MARKET REP., Section 8054 (February 29, 1968).

<sup>59</sup>CCH COMMON MARKET REP., Section 8101 (February 18, 1971).

<sup>60</sup>However, in *Sirena v. Eda* the Court made it clear that the exercise of the trademark right may violate Article 85 if there are also "agreements between owners of the trademark or their successors in interest, where such agreements enable them to prevent imports from other Member States. If the concurrent assignment to several users of a national trademark protecting the same product results in the restoration of impenetrable frontiers between the Member States, such a practice can impair trade between the States and distort competition in the Common Market." CCH COMMON MARKET REP., Section 8101, p. 7112.

non-EEC countries, *e.g.*, export cartels, vertical price maintenance on exports and distributorship obligations for non-EEC markets, will not be governed by Article 85.<sup>61</sup> Thus, the Commission granted a negative clearance [necessarily predicated on a finding that the arrangement did not fall within Article 85(1)] for an exclusive patent and know-how license by a French firm, A. Raymond of Grenoble, to the Japanese Nagoya Rubber Co., for the manufacture and sale in the Far East of plastic fasteners for automobiles. The negative clearance was given although Nagoya was forbidden to export outside the Far East.<sup>62</sup> This attitude is similar to the philosophy behind the American Webb-Pomerene Act in that it shows no concern for export transactions whose effect is felt only outside the Common Market.

However, an export cartel may have appreciably adverse effects on trade between Member States, *e.g.*, "an enterprise located in the EEC may be forced to raise its prices inside the community, because of its obligations outside the Common Market as a party to an international cartel. Likewise, an export cartel may have an influence on the quantity of products available for sale in the EEC and an exclusive dealing arrangement between an enterprise of the Common Market, and a foreign corporation may close the way for other firms. to enter that foreign market."<sup>63</sup>

While the EEC has not concerned itself with purely export transactions, it has paid close attention to arrangements affecting imports into the Common Market, as the latter directly and actually restrict freedom of economic activity within the Common Market.<sup>64</sup> Thus the Commission has recently stated that national cartels restricting imports or setting resale prices for imports must register.<sup>65</sup> Article 85 applies to agreements between non-EEC firms concerning their importing into the EEC products manufactured outside the Common Market, as long as their effect is to restrain producers to consumers within the EEC.<sup>66</sup>

A division of the EEC import market, among several non-ECC producers with fixed prices and a ban on re-exports within the Common Market, is clearly covered by Article 85(1) as trade between Member States is directly affected.<sup>67</sup> The negative clearance in *Grosfillex-Fillistdorf*<sup>68</sup> has been viewed as establishing that a ban on imports into the Common Market may have a sufficiently large, albeit indirect, influence on trade

<sup>61</sup>DERINGER, *supra*, note 7 at 73.

<sup>62</sup>CCH COMMON MARKET REP., Section 9513 (June 9, 1972).

<sup>63</sup>Kruithof in 2 COMMON MARKET L. REV., p. 73.

<sup>64</sup>Ivo E. Schwartz, Proceedings, ABA Conference on Antitrust and the European Communities, September, 1963, pp. 206-207.

<sup>65</sup>CCH COMMON MARKET REP., Section 9424 (March 29, 1971).

<sup>66</sup>DERINGER, *supra*, note 7 at 17.

<sup>67</sup>Schwartz, *supra*, note 24 at 623.

<sup>68</sup>CCH COMMON MARKET REP., Section 7020 (March 11, 1964).

between Member States so that it may violate Article 85(1).<sup>69</sup> In *Grosfillex*, the Commission did not consider it decisive that the parties did not intend to affect intra-EEC trade; thus an unintended effect within the Common Market may suffice for holding an agreement invalid.<sup>70</sup>

"According to the wording of Article 85(1), it suffices if only the person on whom the restrictions are imposed is in one of the six Member States, while the person who imposes the restrictions is outside the territory of the Common Market. . ."<sup>71</sup> The generally accepted test for finding a restriction of competition is that an enterprise be limited by agreement or concerted practice "in its freedom with regard to competitive behavior (internal effect) and that (b) as a result competition on the market is hampered because consumers, suppliers or competitors are limited in their choice (external effect)."<sup>72</sup> In *Béguelin Import Co. v. G.L.Import Export Co.*<sup>73</sup> the Court of Justice established that an exclusive sales agreement between a producer outside the EEC and a distributor within an EEC country is covered by Article 85 if the distributor is prevented from reexporting to other EEC states or can exclude parallel imports of that product from other EEC countries into the protected territory.

It is still unsettled whether the appointment by a non-E.E.C. producer of one exclusive distributor for the whole Common Market, coupled with a ban on re-exports outside the E.E.C., could ever be contrary to Article 85(1). Ebb, basing his argument on *Grosfillex*, reasons that 85(1) should apply if there is "demonstrable impact on trade and competition within the Common Market," through the arrangement providing absolute territorial protection.<sup>74</sup> In another article Ebb cites the impact such an arrangement by the American Bayer-Co. would have:

Nevertheless, the substantial distortion in the flow of imports into the Common Market and (derivatively) among its constituent members caused by American Bayer's grant of absolute territorial protection to that Market, as well as by the outsider's imposition of a ban on exports from the Common Market to third country areas, would have a far greater potential for distorting competition among the Member States than could be foreseen in the *Grosfillex* negative clearance case. . . An international cartel agreement of the type involved in Bayer could be shown to affect trade and competition within the Common Market, and article 85(1) could accordingly be deemed applicable.<sup>75</sup>

<sup>69</sup>Carl H. Fulda, *The First Antitrust Decisions of the Commission of the European Economic Community*, 65 COLUM. L. REV. 625 (1965), pp. 626-627. Deringer in 10 ANTI-TRUST BULL., p. 119.

<sup>70</sup>Schwartz, *supra*, note 24 at 624-625.

<sup>71</sup>HONIG *et al.*, *supra* note 34 at 14.

<sup>72</sup>DERINGER, *supra*, note 7 at 35.

<sup>73</sup>CCH COMMON MARKET REP., Section 8149 (November 25, 1971).

<sup>74</sup>Lawrence F. Ebb, *The Grundig-Costen Case Revisited: Judicial Harmonization of National Law and Treaty Law in the Common Market*, 115 U. PENN. L. REV. 855 (1967), pp. 887-888.

<sup>75</sup>Lawrence F. Ebb, *Common Market Anticartel Law and Trademark and Patent License Agreements*, 16 U.C.L.A. L. REV. 545 (1969), pp. 589-590.

It would not be surprising if EEC supervision of import cartels became more vigorous in the near future and extended to all arrangements having appreciable effects, directly or indirectly, within the Common Market. As far as export cartels are concerned, it definitely will not remain true that the Commission does not move against such agreements restricting exports to non-member countries even when they have important consequences within the EEC.<sup>76</sup>

*F. The Exemption Under Article 85(3)*

Under Article 85(3) the Commission may declare, if the four listed conditions are met, that although an agreement violates 85(1) it shall be exempt from the prohibitions of Article 85. According to EEC Commissioner Schumacher, Article 85(3) "is designed to fulfill the function of a rule of reason. The application of paragraph (3) generally depends on prior notification, and enterprises engaging in restrictive practices therefore cannot wait to see what will happen. If they wish to invoke arguments showing that their agreement is reasonable, they will have to notify."<sup>77</sup>

Other writers claim that 85(3) is not really a legislative rule of reason, because "under article 85(3) the decision is not that the agreement falls outside the 'prohibited' category, but rather that despite its prohibited character the agreement or practice will be tolerated so long as those beneficial purposes are served."<sup>78</sup> Zaphiriou holds that the "appreciable effects" test of 85(1) is the rule of reason, while 85(3) is broader in scope:

Under Article 85(1) and (2) the object of the inquiry is to determine the degree of interference with competition, under Article 85(3) to determine the degree of ultimate consumer benefit. The scope of investigation under Article 85(3) is therefore much wider than would be justified under the rule of reason.<sup>79</sup>

The better view seems to be that 85(1) and (3) are complementary; the "appreciable effects" test of 85(1), and the exemptions under 85(3) together, serve the same role as the American rule of reason.

The four pre-requisites listed in Article 85(3) severely limit the exemptive discretion of the Commission: "It must be emphasized that the Commission may not grant any exemption, whether 'individual' or 'block' unless the strict requirements of the Article 85(3) straight-jacket are satis-

<sup>76</sup>Fred S. Scheuermann, *Common Market and Uncommon Prices?*, 5 J. WORLD TRADE L. 533 (1971), p. 534, describes the situation as it currently exists.

<sup>77</sup>H. Schumacher, *The System of Enforcement: The European Economic Community*, pp. 65-77, in Supplementary Publication No. 6, INT'L. & COMP. L.Q. Stevens & Sons Ltd., London, 1963, p. 69.

<sup>78</sup>Note in 17 STAN. L. REV., p. 269.

<sup>79</sup>G. A. Zaphiriou, *Rule of Reason and Double Jeopardy in European Antitrust Law*, 6 TEX. INT'L. L. F. 1 (1970), p. 6.

fied.”<sup>80</sup> The denial of an 85(3) exemption must be based on a factual evaluation of market conditions, and must be accompanied by clear reasons, or else the Court of Justice will void the decision of the Commission.<sup>81</sup>

If an agreement is properly notified to the Commission according to Regulation No. 17/62,<sup>82</sup> it must be considered as valid until the Commission makes a finding that the agreement violates Article 85(1) and does not qualify for an 85(3) exemption.<sup>83</sup> Under Regulation No. 19/65<sup>84</sup> the Commission may grant an 85(3) exemption to groups of agreements and concerted practices, and this authorization was upheld by the European Court of Justice.<sup>85</sup> Regulation No. 67/67<sup>86</sup> granted such a group exemption to exclusive distributorship agreements containing only the provisions listed in Regulation 67/67, and established that the group exemption eliminated the requirement to notify the Commission of the agreements covered by the group exemption.<sup>87</sup>

## Chapter II. The Extraterritorial Application of Article 85 in Practice

### A. Activities of non-EEC firms within the Common Market

The main aim of this survey is to show that the Commission and the Court of Justice have, in their practice, generally considered the same conduct as violating Article 85 whether or not the parties were EEC companies. Thus the same test of safeguarding the Common Market was always applied, and there was no pattern of discrimination for or against non-EEC firms. The ensuing list of cases does not purport to be all-inclusive, but it conveys the spirit of anti-trust law enforcement by the EEC authorities against non-member state firms.

Within the last few years EEC enforcement of Article 85 has become more forceful overall. Thus it was fairly recently that the EEC for the first time imposed fines for violations of Article 85,<sup>88</sup> and for noncompliance

<sup>80</sup>CAMPBELL, 1 COMMON MARKET L., p. 160.

<sup>81</sup>S.A. Cimenteries C.B.R. Cementsbedrijven N.V. v. Commission of EEC, March 15, 1967. CCH COMMON MARKET REP., Section 8052.

<sup>82</sup>CCH COMMON MARKET REP., Section 2651; Regulation 17/62 governs the filing of applications and notifications with the Commission to comply with the EEC antitrust laws.

<sup>83</sup>Court of Justice decision in S.A. Portelange v. S.A. Smith Corona Marchant International, July 9, 1969. CCH COMMON MARKET REP., Section 8075.

<sup>84</sup>CCH COMMON MARKET REP., Section 2717.

<sup>85</sup>Italy v. EEC Council and Commission, July 13, 1966. CCH COMMON MARKET REP., Section 8048.

<sup>86</sup>CCH COMMON MARKET REP., Section 2727 (March 22, 1967).

<sup>87</sup>Richard M. Buxbaum, *The Group Exemption and Exclusive Distributorships in the Common Market—Procedural Technicalities*, 14 ANTITRUST BULL. 499 (1969), pp. 507–508.

<sup>88</sup>The *International Quinine Cartel* and *Dyestuff* cases which saw the first imposition of fines will be discussed in some detail at Chapter II.A.2. hereunder.

with a Commission request for information during an investigation.<sup>89</sup> Recently, the Commission has moved against 22 sugar refiners,<sup>90</sup> evidencing its determination vigorously to enforce Article 85.

# 1. APPLICATION OF ARTICLE 85 TO NON-EEC FIRMS IN COMMISSION AND COURT OF JUSTICE DECISIONS

*Grosfillex-Fillistdorf*,<sup>91</sup> Commission decision, March 11, 1964: negative clearance granted where a French plastics producer gave the exclusive Swiss distributorship to a Swiss firm. The Swiss company agreed not to handle competitive products and not to re-export into the Common Market. The Commission held competition within the Common Market would not be "perceptibly" affected since re-import into the EEC was unlikely as the product would be subjected to first Swiss and then EEC import tariffs. Further, there were numerous competing producers within the Common Market producing similar goods.

*Bendix-Martens et Straet*,<sup>92</sup> Commission decision, June 1, 1964: negative clearance provided for a non-exclusive distributorship agreement for brakes and accessories between the American manufacturer Bendix and the Belgian distributor Martens et Straet.

*S.A. Nicholas Freres-Vitapro*,<sup>93</sup> Commission decision, June 30, 1964: negative clearance given to the partial sale of its assets by the French firm Nicholas Freres to a British company, Vitapro, for exploitation outside the Common Market. The British purchaser was under the contract barred from making or selling hairdressing products with the EEC for five years, and indefinitely from using the assigned trademark within the EEC. The arrangement was approved as the EEC market in hairdressing products is highly competitive and Nicholas was not one of the largest EEC producers.

*Harbison-Walker Refractories Co.-Basref N.V.*,<sup>94</sup> Commission decision, February 15, 1967: negative clearance granted to an exclusive 15-year license for Holland of the American firm's technical know-how, because the Commission found that most sales by the Dutch licensee were made outside Holland.

*Eurogypsum*,<sup>95</sup> Commission decision, February 26, 1968: negative clearance for European-wide organization set up for joint research to develop the plaster and gypsum industry, without any restrictions on competition among the member firms. EUROGYPSUM has member firms in 16 countries, including 5 EEC states.

*Parke, Davis and Co. v. Probel*,<sup>96</sup> Court of Justice decision, February 29, 1968: the Court held that the exercise of patent rights created by the law of a

<sup>89</sup>*S.A. Raffinerie Tirlemontoise* case in which the Belgian firm was fined \$4000 by the Commission, for failure to submit documents requested for an investigation of the EEC sugar industry. CCH Common Market Reporter, Section 9457 (September 16, 1971, Press Release by the Commission).

<sup>90</sup>"Antitrust Officials of EEC Accuse 22 Sugar Refiners," New York Times, July 25, 1972, p. 51.

<sup>91</sup>CCH COMMON MARKET REP., Section 7020 (March 11, 1964).

<sup>92</sup>CCH COMMON MARKET REP., Section 7024 (June 1, 1964).

<sup>93</sup>CCH COMMON MARKET REP., Section 7025 (July 30, 1964).

<sup>94</sup>CCH COMMON MARKET REP., Section 9155 (February 15, 1967).

<sup>95</sup>CCH COMMON MARKET REP., Section 9220 (February 26, 1968).

<sup>96</sup>CCH COMMON MARKET REP., Section 8054 (February 29, 1968).

Member State did not by itself violate Article 85(1). Although the Court only decided this narrow point of law, the outcome was essential for protecting the rights of the American company. The factual background was that Parke, Davis and Co. held a Dutch patent on the process of making chloramphenicol and licensed its use to a Dutch firm. In Italy processes for making drugs are not patentable and an Italian producer used the process developed by Parke, Davis. When some of the Italian products reached the Dutch market, the licensee wanted to exercise his right under Dutch patent law to bar such imports from Italy.

*Scott Paper Co.*,<sup>97</sup> Commission decision, October 24, 1968: will grant 85 (3) exemption for trademark and know-how licenses on paper products issued by the Scott Paper Co. of Philadelphia to its fully owned Belgian and 50% owned Italian subsidiaries. While the licenses were not exclusive according to their terms, their territorial scope was limited strictly and in fact the American firm granted no other licenses for these territories. Although there was thus only one licensee in the Benelux and Italy, the exemption applied because these licensees agreed not to prevent the importation into their territories of Scott products made by other Scott licensees elsewhere.

*Remington Rand Italia*,<sup>98</sup> Commission press release, June 11, 1969: the American Sperry Rand Corp. granted its Italian trademarks on electric shavers to its Italian subsidiary. Following Commission intervention, the firms 'agreed to desist from using the trademark rights to prevent parallel imports of electric shavers legitimately bearing an authentic 'Remington' trademark. (Query how much force this position of the Commission has following *Sirena v. Eda*<sup>99</sup>)

*Christiani & Nielsen*,<sup>100</sup> Commission decision, June 18, 1969: negative clearance for agreement between a Danish parent and a wholly-owned Dutch subsidiary as the two firms were held to constitute a single enterprise whose parts could not be expected to compete with each other even in the absence of this express agreement not to compete.

*S.A. Portelange v. S.A. Smith Corona Marchant International*,<sup>101</sup> Court of Justice decision, July 9, 1969: the Court established that an arrangement notified to the Commission under Regulation No. 17 remains provisionally valid until the Commission makes a specific finding that the agreement violates Article 85. The underlying case concerned an exclusive distributorship contract given by a Swiss firm to a Belgian company which extended over Belgium and Luxembourg.

*Kodak Subsidiaries*,<sup>102</sup> Commission decision, June 30, 1970: negative clearance for the standardized general sales conditions imposed by the EEC national subsidiaries of the American Eastman Kodak Co., following a finding that the whole Kodak group constituted one enterprise. The approved distribution scheme was limited to dealers meeting certain professional standards for qualifying, but the Commission considered this restriction justified, in order to insure good post-sale servicing, maintenance of quality and promotion of the trademark. However, the acceptance of the scheme was obtained

<sup>97</sup>CCH COMMON MARKET REP., Section 9263 (October 24, 1968).

<sup>98</sup>CCH COMMON MARKET REP., Section 9307 (June 11, 1969).

<sup>99</sup>CCH COMMON MARKET REP., Section 8101 (February 18, 1971, decision by the Court of Justice).

<sup>100</sup>CCH COMMON MARKET REP., Section 9308 (June 18, 1969).

<sup>101</sup>CCH COMMON MARKET REP., Section 8075 (July 9, 1969).

<sup>102</sup>CCH COMMON MARKET REP., Section 9378 (June 30, 1970).



only after the elimination of those clauses from the general sales contract that had effectively prevented re-exports within the Common Market.

*Omega*,<sup>103</sup> Commission decision, October 28, 1970: 85(3) exemption granted for EEC distribution system of the Swiss watch manufacturer Omega. Omega established objective conditions for qualifying as a distributor and limited the number of authorized retailers. The Commission accepted this restriction on EEC competition as it still permitted a good distribution of Omega watches while assuring a profitable volume to the dealers. A re-export ban within the Common Market had to be abandoned, but Omega dealers are still restricted to selling to other authorized dealers and to private customers within the EEC.

*White Horse Distillers Ltd.*,<sup>104</sup> Commission decision, February 2, 1971: the Commission announced that it will approve an exclusive distributorship agreement between the British whiskey producer and a French firm for most of France, although the French distributor agreed "not to try to sell" outside its assigned territory. On the same day the Commission publicized that it planned to accept a standard contract between the English Distillers Co. and various EEC ship suppliers, which prevented resale except for duty-free consumption.

*Commission decisions of October 9, 1971*,<sup>105</sup> on this date the Commission announced that 3 international agreements would be upheld.

*Burroughs Corp. of Detroit*,<sup>106</sup> Commission decision, December 22, 1971: negative clearance for patent and know-how licensing agreements on the manufacturer of plasticized carbon paper between Burroughs and a German firm for Germany and a French firm for France.

*SPAR*,<sup>107</sup> Commission announced on April 11, 1972, that a negative clearance would be forthcoming for the by-laws and contract of the international foodstuffs distributing organization SPAR. SPAR is composed of 14 national organizations, with 5 of the countries being EEC Member States.

*Davidson Rubber Co., of Charlestown, Mass.*,<sup>108</sup> Commission decision, June 9, 1972: 85(3) exemption for exclusive patent licensing contracts by Davidson Rubber for the manufacture of automobile armrests with German, French and Italian companies in their respective countries.

## 2. THE QUININE CARTEL AND DYESTUFF MANUFACTURERS DECISIONS

In its July 16, 1969, *International Quinine Cartel* decision,<sup>109</sup> the Commission imposed for the first time fines<sup>110</sup> on EEC firms for violation of

<sup>103</sup>CCH COMMON MARKET REP., Section 9396 (October 28, 1970).

<sup>104</sup>CCH COMMON MARKET REP., Section 9413 (February 2, 1971).

<sup>105</sup>CCH COMMON MARKET REP., Section 9414 (February 2, 1971).

<sup>106</sup>CCH COMMON MARKET REP., Section 9485 and 9486, (December 22, 1971).

<sup>107</sup>CCH COMMON MARKET REP., Section 9505 (April 11, 1972).

<sup>108</sup>CCH COMMON MARKET REP., Section 9512 (June 9, 1972).

<sup>109</sup>CCH COMMON MARKET REP., Section 9313 (July 16, 1969).

<sup>110</sup>Under Regulation No.17/62 an enterprise may be fined between \$1000 and \$1 million or 10% of its annual turnover for wilfull or negligent violation of Articles 85 or 86; between \$50 and \$1000 per day for noncompliance with a Commission order to cease and desist from partaking in an illegal arrangement; and between \$100 and \$5000 for filing false or misleading, incomplete information with the Commission, or for refusing to submit to an investigation. See CCH COMMON MARKET REP., Sections 2542, 2551 and 2552.

Article 85 by gentlemen's agreements on prices, production controls and marketing quotas within the Common Market. In 1960 all European quinine producers signed overt contracts setting export prices and quotas for their non-EEC trade. "Two days after the agreements were signed, two gentlemen's agreements were reduced to writing, but purposely not signed. These gentlemen's agreements extended the effect of the signed agreements into the EEC states. . . ."<sup>111</sup>

Since the Commission was not notified of the gentlemen's agreements, the issue of a possible 85(3) exemption never arose.<sup>112</sup> On July 15, 1970, the Court of Justice upheld the Commission in three related decisions,<sup>113</sup> although the Court slightly reduced the fines. In these decisions the Court made some important determinations: a gentlemen's agreement expressing the parties' common intent may be contrary to Article 85; a Commission decision imposing fines must be accompanied by reasons revealing the factual and legal bases for the fines, and may be published by the Commission; fines may be levied for past as well as for present conduct, and even if the violations had already ceased prior to the Commission's intervention; and in setting the amount of the fine "account must be taken of the nature of the restriction on competition, the number and size of the enterprises involved, the respective share of the market that they control in the Community, and the market situation at the time the violation was committed."<sup>114</sup>

The Court also held that "(a) fine imposed by a foreign (= non-EEC) jurisdiction for the same set of facts cannot be used to offset a fine for a restriction of competition occurring within the Community,"<sup>115</sup> and that the Commission hence acted properly when, in fining the German Boehringer Mannheim GmbH, it disregarded the fact that the firm had already been fined \$80,000 for anti-trust violations by a United States court.<sup>116</sup>

On July 24, 1969, the Commission fined ten Dyestuff Manufacturers<sup>117</sup> for their concerted practices in the recurrently simultaneous and equal

<sup>111</sup>Case Note on *International Quinine Cartel and Dyestuff*, 3 N.Y.U. J. INT'L. L. & POL. 174 (1970), p. 176.

<sup>112</sup>Failure to properly notify the Commission prevents a negative clearance for 85(1), an exemption under 85(3), and the provisional validity of the arrangement pending a decision by the Commission, but has no bearing on whether or not an agreement or concerted practice in fact violates Article 85(1). See CCH COMMON MARKET REP., Sections 2442.01 and .03.

<sup>113</sup>ACF Chemiefarma N.V. v. Commission of EEC, CCH COMMON MARKET REP., Section 8083; Buchler and Co. v. Commission of EEC, CCH COMMON MARKET REP., Section 8084; Boehringer Mannheim GmbH v. Commission of EEC, COMMON MARKET REP., Section 8085.

<sup>114</sup>ACF Chemiefarma N.V., CCH COMMON MARKET REP., Section 8083, p. 8177.

<sup>115</sup>Boehringer Mannheim GmbH, CCH COMMON MARKET REP., Section 8085, p. 8222.

<sup>116</sup>*Id.*

<sup>117</sup>CCH COMMON MARKET REP., Section 9314.

increases of their sales prices within the Common Market.<sup>118</sup> The companies fined included three Swiss firms, Ciba, Geigy and Sandoz, and one British firm, Imperial Chemical Industries. Trade between Member States was impaired because the uniform pricing for each EEC country covered all imports into the EEC by the fined producers and their distributor subsidiaries, and served to eliminate intra-Common Market trade. Since the ten producers fully controlled and directed their sales subsidiaries, the fines were levied only against the producers. The Commission asserted that it had jurisdiction also over the non-Member State producing enterprises:

Under Article 85, paragraph 1, of the Treaty establishing the EEC, all agreements between enterprises. . . and all concerted practices that are capable of affecting trade between Member States and whose object or effect is to prevent, restrict, or distort competition within the Common Market, are incompatible with the Common Market and prohibited. The rules of competition of the Treaty are therefore applicable to all restrictions of competition that produce within the Common Market effects to which Article 85, paragraph 1, applies. There is therefore no need to examine whether the enterprises that originated such restraints of competition have their head office within or outside the Community.<sup>119</sup>

Thus the jurisdictional claim of the Commission extends to conduct by non-EEC firms outside the Common Market which has a trade restrictive effect within the Common Market, and is arguably even broader than the American claim in *Alcoa*<sup>120</sup> over conduct by foreigners abroad, which is intended to and does restrain American commerce. The Commission stressed that the defendants restrained competition within the EEC "quite substantially"; it did not consider whether an insubstantial intra-EEC effect (which may still amount to an "appreciable effect") of a foreigner's conduct abroad was covered by Article 85, or whether foreign defendants must have some jurisdictional base within the Common Market in the form of a branch or subsidiary, since all the foreign defendants in the *Dyestuff* case had EEC subsidiaries and representatives.<sup>121</sup>

Perhaps, since this was the first instance of enforcement against non-EEC enterprises, the Commission should only have issued cease and desist orders to all ten manufacturers.<sup>122</sup> Alternatively, the Commission

<sup>118</sup>The following facts were held to prove the existence of the concerted practice: great proximity in timing of the price increases; striking similarity of language in the orders to branches and subsidiaries to raise prices; the increases always affected categories of dyes which were the same for all producers, and the pricing system worked out to equal prices by all the manufacturers for each national market. Note in 3 N.Y.U. J. INT'L. L. & POL., p. 181.

<sup>119</sup>*Dyestuff Manufacturers*, CCH COMMON MARKET REP., Section 9314, pp. 8693-8694.

<sup>120</sup>148 E.2d 416 (2d Circuit, 1945).

<sup>121</sup>Markert. *supra*, note 20 at 896-897.

<sup>122</sup>Of course the Commission would not want to show favoritism toward the foreign firms, by only issuing cease and desist orders as to them while heavily fining the EEC firms involved in the same practices.

could have avoided the extraterritorial enforcement issue completely, by attacking directly the price-fixing acts of the EEC subsidiaries of the non-EEC producers. Clearly, even a wholly foreign-owned EEC company is subject to EEC regulation just like any other Member State firm.<sup>123</sup> If the subsidiaries claimed lack of economic independence due to parental control, then the resultant single enterprise undeniably was actively engaged in business within the EEC, so that the EEC authorities would have jurisdiction over the whole group. The dyestuff manufacturers affected appealed to the Court of Justice which upheld the fines imposed by the Commission on all ten firms, including the fines levied on the companies from outside the EEC.<sup>124</sup>

Britain has challenged the jurisdiction of the Commission to fine non-EEC firms "in the form of a communication from London to the effect that while taking no stand on the merits of the case, the British Government is concerned over its international law aspects, and the failure to distinguish between the parent organizations and their EEC subsidiaries."<sup>125</sup> While Britain did not officially join in the appeal by I.C.I. to the Court of Justice, a memorandum by the Government containing its views "on the so-called extra-territorial application of the rules of competition" was submitted to the Court.<sup>126</sup>

The Commission's response is that the foreign firms in the *Dyestuff* case acted within the Community, by giving binding instructions to their EEC subsidiaries and representatives.<sup>127</sup> British opposition is surprising in light of the 1956 English Restrictive Trade Practices Act, which applies to all persons "carrying on business within the United Kingdom. Whether these persons (or companies) are resident within the United Kingdom or outside of it, is of no importance. . ."<sup>128</sup> However, British practice insists that to be covered "the foreign company must have substantial visible commercial activity on British soil," and generally accepts the legal separateness of parents and subsidiaries without piercing the corporate veil.<sup>129</sup>

If one of the fined firms had been American, the U.S. would be in a very weak position to object since it has traditionally been the country most vigorous in the extraterritorial application of its antitrust laws.<sup>130</sup> In his

<sup>123</sup>Nebolsine *supra*, note 27 at 481.

<sup>124</sup>CCH COMMON MARKET REP., No. 191, July 19, 1972.

<sup>125</sup>CCH COMMON MARKET REP., "Euromarket News," December 2, 1969, p. 1.

<sup>126</sup>CCH COMMON MARKET REP., Section 9397 (November 18, 1970, Commission response to a written question), p. 8873.

<sup>127</sup>*Id.*, at 8874.

<sup>128</sup>Deringer in 12 INT'L. & COMP. L. Q., p. 583.

<sup>129</sup>Kruihof in 2 COMMON MARKET L. REV., p. 84.

<sup>130</sup>See, e.g., JAMES A. RAHL, ed., COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT, McGraw-Hill, New York, 1970, pp. 50-89, and Note, Extraterritorial

*Alcoa* decision<sup>131</sup> Judge Learned Hand asserted American antitrust jurisdiction over a cartel made abroad and including no U.S. participants, because the agreement was intended to and did restrain American trade. The case marked the first time that U.S. jurisdiction was based solely on effects within the U.S., with no acts being committed on U.S. territory and without participation of any American party in the attacked arrangement.<sup>132</sup>

#### *B. Application to Activities of EEC Firms Outside the Common Market*

Since Article 85 is only concerned with restrictions of competition within the Common Market, "arrangements with firms outside the Common Market, or between firms inside but aimed solely at transactions outside the Market, are likely to be exempt. Only a showing of repercussions inside the Market would alter the result."<sup>133</sup>

The Commission has displayed no urge to find that arrangements by EEC firms concerning their conduct outside the Common Market had appreciably restrictive effects on competition within the Community. A written agreement setting export prices and quotas to non-EEC countries was not even examined as to its intra-EEC effects in the *Quinine Cartel* case.<sup>134</sup> In *Grosfillex*,<sup>135</sup> negative clearance was given to an exclusive distributorship in Switzerland, even though the Swiss distributor agreed not to sell outside his territory, not to handle competitive products, and not to re-export into the EEC.

In *Dutch Engineers and Contractors Association*<sup>136</sup> an agreement calling for cooperation and pooling in large construction contracts to be performed outside the Common Market was approved by the Commission. The accepted, revised distribution schemes in *Kodak*,<sup>137</sup> *Omega*<sup>138</sup> and

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Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law under the Sherman Act, 20 VAND. L. REV. 1030 (1967). Other U.S. legislation is applied extra-territorially to U.S. persons controlling foreign subsidiaries; see Eckard Rehbinder, *The Foreign Direct Investment Regulations: A European Legal Point of View*, 34 L. & CONTEMP. PROB. 95 (1969), and William Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections of Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970).

<sup>131</sup> 148 E.2d 416 (2d Circuit, 1945).

<sup>132</sup> RAHL, ed., COMMON MARKET AND AMERICAN ANTITRUST, p. 382.

<sup>133</sup> Fulda *supra*, note 69 at 642-643.

<sup>134</sup> The written agreement involved Dutch, German, French and British firms, and set export prices and quotas for non-EEC markets. The EEC authorities were only concerned with the extension of this written arrangement by gentlemen's agreements to the EEC markets. ACF Chemiefarma N. V., CCH COMMON MARKET REP., Section 8083, pp. 8178-8180.

<sup>135</sup> CCH COMMON MARKET REP., Section 7020.

<sup>136</sup> CCH COMMON MARKET REP., Section 7030 (October 22, 1964).

<sup>137</sup> CCH COMMON MARKET REP., Section 9378.

<sup>138</sup> CCH COMMON MARKET REP., Section 9396.

*N.V. Philips Gloeilampenfabrieken*<sup>139</sup> all preserved a ban on re-exports outside the Common Market; it was assumed that the double customs duties made re-imports into the Common Market unlikely even if no restrictions were placed on exports outside the EEC, so that the ban on exports outside the EEC did not affect trade within the Common Market. But if this is true, why did Philips, Kodak and Omega insist on retaining the meaningless clause banning exports outside the EEC?

A licensing agreement, whereby the French partnership *A. Raymond* gave a patent, know-how and trademark license to the *Japanese Nagoya Rubber Co.*<sup>140</sup> on fasteners used in the auto industry received Commission approval, although the Japanese firm was restricted to producing in Japan and selling in the Far East. In *Rieckermann-AEG Elotherm*<sup>141</sup> exclusive distributor agreements for Japan and Korea between two German firms were given negative clearance despite an express clause, prohibiting the distributor from selling the German-made heating and melting equipment outside of Japan and Korea.

National agreements on controlling fertilizer exports were upheld by the Commission, once bans on exports by association member firms to other EEC countries were removed, but bans on such exports to non-EEC states could be retained.<sup>142</sup> Finally in *CIMFRANCE*<sup>143</sup> the Commission accepted an agreement among French cement producers setting uniform export prices and export quotas for the members once the agreement was so revised as not to apply to trade between Member States.

Thus one may fairly conclude that there has been little attempt at true extra-territorial enforcement of Article 85, *i.e.*, against activities by EEC firms outside the Common Market. The Commission has only limited jurisdiction in this area since "trade between the Member States" must be affected and an effect on the foreign commerce of a Member State does not suffice.

The writer would like to end the discussion of Article 85 by raising the question whether the *Quinine Cartel* and the *Dyestuff* cases portend a stronger enforcement of Article 85, or "would the Commission have taken its two major decisions imposing fines on firms which were parties to agreements in the markets for quinine and dyestuffs, if it had not been put

<sup>139</sup>CCH COMMON MARKET REP., Section 9294 (March 6, 1969, Press Release by the Commission).

<sup>140</sup>CCH COMMON MARKET REP., Section 9513 (June 9, 1972).

<sup>141</sup>CCH COMMON MARKET REP., Section 9267 (November 6, 1968).

<sup>142</sup>CCH COMMON MARKET REP., Section 9315 (July 15, 1969, for Italy), Section 9408 (December 23, 1970, for France).

<sup>143</sup>CCH COMMON MARKET REP., Section 9475 (November 6, 1971, Press Release by the Commission).

on the spot by the U.S. Dept. of Justice in the first case and the German Bundeskartellamt in the second?"<sup>144</sup>

### **Chapter III. Article 86: Ban on Abuses of a Dominant Position**

#### *A. The scope of applicability*

Article 86 prohibits "any abusive exploitation by one or more enterprises of a dominant position within the Common Market."

Article 86 of the Rome Treaty is directed against the evils which are generally said to flow from monopoly rather than against monopoly itself: the fixing of unreasonably high prices, the limitation of supply in order to exact higher prices, the refusal as a deliberate policy to introduce technological improvements or innovations.<sup>145</sup>

The approach taken by Article 86 is based upon an attitude of neutrality toward the existence of market dominant positions. It does not try to break up monopolistic positions, but instead, is confined to supervising the conduct and performance of dominant firms. Remedies are thus behavioral rather than structural. In cases of abuses, the enforcement agency could go as far as to set the prices at which dominant firms can sell or fix the quantities which they must produce.<sup>146</sup>

Article 86 covers market domination by several enterprises when there is no competition between them due to a legal or factual, economic relationship. "Where several enterprises are consolidated in a combine, application of Article 86, in contrast to Article 85(1), does not depend upon whether, notwithstanding their legal independence, they may be considered to be one or several enterprises from an economic point of view."<sup>147</sup> Joliet writes in the same vein, that "Article 86 could reach dominant positions based on overt collusive agreements within the meaning of Article 85, as well as groups of enterprises which constitute legally distinct entities but which are subject to a unified economic control and also certain oligopoly situations."<sup>148</sup>

There is general agreement that a non-EEC company may hold a dominant position within the Common Market, and hence be subject to Article 86 when it abuses that dominant position.<sup>149</sup> Likewise, an enterprise located and producing in only one Member State may dominate a substantial part of the Common Market.<sup>150</sup> The relevant market for establishing the

<sup>144</sup>T. O. Moss, *The European Community Still Has No Competition Policy*, 16 ANTI-TRUST BULL. 443 (1971), p. 447.

<sup>145</sup>RENÉ JOLIET, *MONOPOLIZATION AND ABUSE OF DOMINANT POSITION*, Martinus Nijhoff, La Haye, 1970, p. 9.

<sup>146</sup>*Id.* at 127-128.

<sup>147</sup>DERINGER, *supra*, note 7 at 172.

<sup>148</sup>JOLIET, *supra*, note 145 at 237.

<sup>149</sup>LANG, *THE COMMON MARKET AND COMMON LAW*, pp. 424-425. DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY*, p. 172. HONIG *et al.* *CARTEL LAW OF EUROPEAN ECONOMIC COMMUNITY*, p. 36.

<sup>150</sup>HONIG *et al.*, *supra*, note 34 at 37.

existence of a dominant position is not the place of production, but the place where the goods or services are furnished to the users or consumers.<sup>151</sup>

Even if the sales or services area dominated by an enterprise only encompasses one Member State, the Commission has held that one EEC state may constitute "a substantial part of the Common Market."<sup>152</sup> No separate rule of reason applies to Article 86, since by definition any abuse of a dominant position must be of a magnitude to warrant its prohibition,<sup>153</sup> and there is also no provision for possible exemptions.

The Commission has adopted no comprehensive regulations for applying Article 86, and its application on an ad hoc basis has until very recently been non-existent. Therefore, both theoretical and practical standards for the jurisdictional elements of "dominant position," its "abusive exploitation," and its "effect upon trade within the Common Market or within a substantial part of it" are lacking. EEC policy favors mergers and has shown little concern as to whether or not the merger will create a dominant position within the EEC for some product.<sup>154</sup>

The European Court of Justice has intimated that no abuse will be automatically assumed from the existence of a dominant position. In *Parke, Davis and Co.*<sup>155</sup> the exercise of patent rights, in *Sirena v. Eda*<sup>156</sup> the exercise of trademark rights, and in *Deutsche Grammophon Gesellschaft mbH*<sup>157</sup> the exercise of a right akin to copyright, were all held by the Court not necessarily to constitute such abuses even though great price differentials were thus brought about between national markets, through the power under the national laws to exclude others from importing the patented, trademarked or copyrighted goods.

Prior to the case of *Euroemballage*, the Continental Can subsidiary, there was only one instance in which the Commission found a violation of Article 86. That case involved *GEMA*,<sup>158</sup> a German company holding musical copyrights in Germany, and having a turnover of DM 150 million annually, and the firm was held to have abused its dominant position in Germany by restricting the economic freedom of composers, authors and musicians there:

<sup>151</sup>DERINGER, *supra*, note 7 at 172.

<sup>152</sup>In its decision against *GEMA*, CCH Common Market Reporter, Section 9438 (June 2, 1971).

<sup>153</sup>Zaphiriou, *supra*, note 79 at 9.

<sup>154</sup>*See, e.g.,* McLACHLAN and SWANN, COMPETITION POLICY IN THE EUROPEAN COMMUNITY, and Kurt E. Markert, *Antitrust Aspects of Mergers in the EEC*, 5 TEX. INT. L. F. 32 (1969).

<sup>155</sup>CCH COMMON MARKET REP., Section 8054 (February 29, 1968).

<sup>156</sup>CCH COMMON MARKET REP., Section 8101 (February 18, 1971).

<sup>157</sup>CCH COMMON MARKET REP., Section 8106 (June 8, 1971).

<sup>158</sup>CCH COMMON MARKET REP., Section 9438 (June 2, 1971).



GEMA holds a dominant position in the Federal Republic of Germany, which is a substantial part of the Common Market; in fact it has no competitors there. GEMA abuses this dominant position in that it

- discriminates against nationals of other Member States,
- imposes obligations on its members in a manner that is not essential,
- prevents, through its system, the realization of a single market for the services of music publishers,
- extends the copyright, by contract, to non-protected works,
- discriminates against independent importers of records as compared to record producers, and
- discriminates against importers of tape recorders and video recorders as compared to German producers of such equipment.<sup>159</sup>

The fact that GEMA requires the copyrights for all types of copyrighted works and for the entire world to be transferred to it is in principle abusive. Gema's defense of this practice is without basis. . . The objections against GEMA directly concern its abusive efforts to extend its dominant position into an absolute monopoly by means of several provisions of the transfer agreement. . .<sup>160</sup>

The cited provisions of the by-laws, the distribution plan, the transfer agreement, and the by-laws of the Social Fund make membership in copyright companies in other States difficult and prevent the realization of a single market for the services of music publishers in the Community. . .<sup>161</sup>

GEMA was given six months to effectuate the required changes, in order to comply with the Commission's order. It is noteworthy that activity essentially within one Member State was considered "a substantial part of the Common Market," and that the attempt to extend an existing dominant position was held an abuse.

It seems that now the Commission will become more forceful in moving against abuses of dominant position, by established monopolies and oligopolistic firms acting in concert, and possibly now some of the bitter criticism of EEC inactivity in this sphere<sup>162</sup> may be stilled.

3. The Commission has every intention of preventing any abusive exploitation of dominant positions within the Common Market. Subject to a contrary interpretation by the Court of Justice, the Commission also applies Article 86 of the EEC Treaty to concentrations of enterprises holding a dominant position where they are detrimental to the consumers.<sup>163</sup>

## *B. The Merger Policy of the EEC and Europemballage*

Commissioner von der Groeben has summarized the competition policy of the Common Market as follows:

First it must remove artificial obstacles to mergers that are economically desirable within the Common Market, and thus ensure that Common Market

<sup>159</sup>*Id.*, at 8951-8.

<sup>160</sup>*Id.*, at 8951-9.

<sup>161</sup>CCH COMMON MARKET REP., Section 9438, p. 8951-13.

<sup>162</sup>*See, e.g.*, Moss in 16 ANTITRUST BULL., pp. 446-447.

<sup>163</sup>CCH COMMON MARKET REP., Sec. 9507 (May, 1972, Information Memo from the Commission on the Commission's Special Report on Competition Policy), p. 9118.

firms can compete on world markets. Secondly, it must try to eliminate artificial distortions of competition between large firms and medium-size and small firms. Thirdly, it must ensure that competition remains effective.<sup>164</sup>

These aims are also expressed by Commission notices favoring concentrations<sup>165</sup> and cooperation between small- to medium-sized enterprises<sup>166</sup> within the EEC. The Commission favors mergers to help Member-State firms adjust to the Common Market, and to improve their competitiveness with large non-EEC enterprises, and to facilitate the integration of the national markets.<sup>167</sup>

The Memorandum on Concentration of Firms<sup>168</sup> states the Commission's view that while Article 85 did not apply to mergers, in rare cases Article 86 did: "Indeed, the conditions under which a merger would be prohibited by Article 86 are extremely narrow. Not only must the 'active' enterprise already have a dominant position, but the merger must also lead to a 'monopolistic situation' or even to 'complete elimination of competition'."<sup>169</sup> Article 86, directed only against abuse of an already existing dominant position, is a weak instrument for controlling mergers. The Commission's abnegation of reliance on Article 85 to control mergers has been severely criticized by some commentators.<sup>170</sup>

While mergers and acquisitions have generally disturbed Common Market authorities very little, American acquisitions of EEC companies have alarmed the Common Market.<sup>171</sup> The following remarks reveal the concern within the EEC:

<sup>164</sup>Von der Groeben in 10 ANTITRUST BULL., pp. 922-923.

<sup>165</sup>Memorandum on Concentration for Firms in the Common Market, CCH COMMON MARKET REP., Section 9081. A detailed discussion of the Memorandum may be found in, H. W. de Jong, "Concentration in the Common Market: A Comment on a Memorandum of the EEC Commission," 4 COMMON MARKET REV. 166 (1966-7).

<sup>166</sup>Notice Concerning Agreements, Decisions and Concerted Practices in Co-operation between Enterprises, CCH COMMON MARKET REP., Section 2699 (July 29, 1968). The Notice states that "(t)he Commission welcomes cooperation among small and medium-sized enterprises where such corporation enables them to work more rationally and increase their productivity and competitiveness on a larger market. . . However, cooperation among large enterprises, too, can be economically justifiable without presenting difficulties from the angle of competition policy." For Commission decisions approving agreements to cooperate, see, CCH COMMON MARKET REP., Section 9188 for the *Transocean Marine Paint Association*, Section 9249 for *Alliance de Constructeur Francais de Machines-Outils*, Section 9250 for *SOCEMAS* and Section 9251 for *ACEC-Berliet*. These cases are discussed in detail in, Note, Horizontal Integration of the Common Market Economy: Recent Decisions and Communications by the Commission of the European Communities, 6 TEX. INT'L. L. F. 259 (1970).

<sup>167</sup>JOLIET, *supra*, note 145 at 16.

<sup>168</sup>CCH COMMON MARKET REP., Section 9081.

<sup>169</sup>Markert in 5 TEX. INT'L. L. F., p. 51.

<sup>170</sup>*Id.*, at 53-54. and Moss in 16 ANTITRUST BULL., pp. 444-445.

<sup>171</sup>Westinghouse Investment Plans Draw Commission Rebuff, CCH COMMON MARKET REP., Section 9327 (October 10, 1969, Commission Response to M.P. Glinne). U.S. Economic Penetration in Europe, CCH COMMON MARKET REP., Section 9398 (November 10, 1970, Commission Response to M.P. Glinne).

That the question of direct investments by third countries in the countries of the Common Market is of the utmost importance, and that the Community should agree to take a common position on this matter. . . Furthermore, the Commission believes that a Community policy is needed, and that the solution to the problem of striking a balance between Community and foreign capital lies in the very dynamism of European industry itself.<sup>172</sup>

The EEC Commission has chided the member states for failure to cooperate to prevent American take-overs of key sections of industry. The rebuke came in an answer to a question from a member of the European Parliament on Westinghouse's attempts to merge Belgian, French and Italian firms (in the heavy electrical industry) into a Europe-wide group. . . The reply said that foreign investment in Europe was an important asset but might sometimes be inadvisable. The responsibility lay with the six governments to take measures to solve the problems that usually underlie take-over bids, and though a common policy was needed, European industry had to face up to foreign competition.<sup>173</sup>

Without going so far as to advocate a protectionist attitude, the Commission believes that investments across frontiers should develop with due regard for the Community's rules of competition and ensure an adequate balance between the opportunities for foreign investments in the Community and those given to Community investments in third countries.<sup>174</sup>

American direct investment in the EEC countries had only amounted to \$0.6 billion in 1950, but grew to \$7.6 billion by 1966 and to \$8.4 billion by 1967, with \$407 million in profits being repatriated to the U.S. in 1967.<sup>175</sup> By 1968, U.S. firms had \$9 billion invested in EEC states, but this face value only represents half of the market value of the holdings, and the market value only represents half of the assets controlled by American parent enterprises; thus in 1968 American-controlled assets within the EEC amounted to over \$30 billion.<sup>176</sup>

At the end of 1969 U.S. direct investment within the Common Market totaled \$10.2 billion, of which \$4.25 billion was in Germany;<sup>177</sup> by the end of 1970 the U.S. direct investment figure rose to \$11.7 billion in the EEC.<sup>178</sup> Within the Common Market in 1967, American enterprises acquired 48 industrial interests while EEC enterprises made only 17 acquisitions; during the same year U.S. firms established 93 industrial and 103 marketing subsidiaries while Common Market firms set up 43 industrial and 104 marketing subsidiaries.<sup>179</sup>

<sup>172</sup>CCH COMMON MARKET REP., Sec. 9327, p. 8728.

<sup>173</sup>CCH COMMON MARKET REP., "Euromarket News," October 21, 1969, p. 2.

<sup>174</sup>CCH COMMON MARKET REP., Section 9384 (July 14, 1970, Commission Response to M.P. Oule).

<sup>175</sup>RAHL, ed., *Common Market and American Antitrust*, pp. 34-35.

<sup>176</sup>CCH COMMON MARKET REP., Section 9387 (August 18, 1970, Press Release by the Commission), p. 8838.

<sup>177</sup>Committee for Economic Development, *The United States and the European Community*, New York, 1971, p. 72.

<sup>178</sup>*Id.*, p. 34.

<sup>179</sup>CCH COMMON MARKET REP., Section 9387, pp. 8842-8843.

Since 1962, non-EEC companies were involved in sixty-eight percent of the mergers in the metal industry, sixty-five percent in the chemical industry, sixty-three percent in the food industry, and sixty-two percent in textiles.<sup>180</sup> The resultant feelings of "(e)conomic dependence, loss of the initiative to develop one's own national market because of the presence of large and efficient and well-funded American companies, and the concomitant feeling of social and cultural dependence, all are very disturbing to Europeans."<sup>181</sup>

It is in this light that one must view the Commission's decision against the American Continental Can Co.<sup>182</sup> based on the acquisition by its wholly owned subsidiary, Europemballage Corp. of Wilmington, Del. and Brussels, Belgium, of majority control in Thomassen en Drijver-Verblifa NV of Deventer, Netherlands. The decision began by holding that Continental Can was accountable for the conduct of its subsidiary Europemballage, and for the conduct of Schmalbach-Lubeca-Werke AG (SLW), the German subsidiary of Europemballage.<sup>183</sup> Under Article 86 the Commission had first to identify a "Dominant Position":

3. Enterprises are in a dominant position when it is possible for them to take independent lines of conduct and this enables them to act without much regard for competitors, buyers, or suppliers. . .
4. Continental has a dominant position in Germany on the market for light containers for canned meat and fish and for metal lids for glass jars. This dominant position results from the shares which its subsidiary SLW holds on the various market segments in the sector for light containers and from the group's economic, financial, and technical importance.<sup>184</sup>

Then the Commission proceeded to find "Abuse of the Dominant Position":

23. Where an enterprise that has a dominant position strengthens that position through a concentration with another enterprise, with the result that the competition, which actually or potentially might have subsisted in spite of the existence of the dominant position, is virtually eliminated for the products concerned in a substantial part of the Common Market, this constitutes conduct that is incompatible with Article 86 of the Treaty. . .
25. For most of the metal containers they produced, there was a possibility for Continental in Germany (SLW) and TDV to compete with each other. . .
27. It should therefore be considered that SLW and TDV, prior to their consolidation within Europemballage, were potential competitors in a large common sphere of action, situated on both sides of the frontiers between Germany and the Benelux countries. . .
28. This territory represents a substantial part of the Common Market.<sup>185</sup>

<sup>180</sup>CCH COMMON MARKET REP. "Euromarket News," May 19, 1970, p. 3.

<sup>181</sup>RAHL, ed., COMMON MARKET AND AMERICAN ANTITRUST, p. 35.

<sup>182</sup>CCH COMMON MARKET REP., Section 9481 (December 13, 1971).

<sup>183</sup>*Id.*, at 9029.

<sup>184</sup>*Id.*

<sup>185</sup>*Id.*, at 9032.

While no divestiture order was issued, Continental Can was required to submit proposals to the Commission before July 1, 1972, in order to end its violation of Article 86.<sup>186</sup> In fact the Commission and Continental Can could not arrive at a settlement and the case is inexorably headed toward final resolution by the Court of Justice.<sup>187</sup>

Although the *Continental Can* decision may be attacked for defining the relevant market too narrowly (metal cans for fish and meat), for finding market domination from operations in only one country (Germany), for finding an abuse of dominant position in a merger eliminating an arguably potential, but historically non-existent, competitor, and for holding that an acquisition of control constituted abuse of a dominant position,<sup>188</sup> focusing on the extraterritorial application of the EEC antitrust laws, the author's main questions concerning the decision are:

- 1) Is the Commission's newly evident activism limited to attacking acquisitions by non-EEC, especially American-controlled, firms, or will the Commission now also move against intra-EEC mergers and acquisitions?
- 2) Will the Commission move directly against foreign companies, or will it only act against acquisitions effectuated through EEC subsidiaries?
- 3) Will the Court of Justice uphold the application of Article 86 to cases in which the alleged abuse consisted of the extension of a preexisting dominant position through a merger?

It is felt that while the Commission will be selective in attacking acquisitions and mergers, it will not hesitate to move either against EEC firms or against foreign firms without active, pre-existing EEC subsidiaries. Further, it is almost certain that the Court of Justice will sanction the use of Article 86 to prevent undesirable mergers and acquisitions. As a consequence of the strong, and not wholly unjustified fear of American business domination that prevails within the Common Market and of the latitude enjoyed by the Commission in the antitrust field, it is very possible that in the future Article 86 will be utilized to prevent take-overs by U.S.-controlled interests.

<sup>186</sup>*Id.*, at 9033.

<sup>187</sup>"Continental Can Says Case Against a Unit in Europe Moves Along," *Wall Street Journal*, April 26, 1972, p. 10. "U.S. Can Maker Faces Court Action," June 29, 1972, p. 57.

<sup>188</sup>See, *EEC Antitrust-Continental Can Company Held To Be in Violation of Article 86 of the Treaty of Rome*, 5 N.Y.U. J. INT'L. L. & POL. 357 (1972).